93-1596

NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA,

Petitioner,

v.

DARRYL TRAVIS WATKINS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION OF THE STATE OF ALABAMA

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QUESTION PRESENTED

Respondent was tried for and convicted of capital robbery-murder in 1982. After obtaining two remands from the Alabama Supreme Court, counsel again petitioned that court for certiorari review; in 1987, he presented a claim pursuant to Batson v. Kentucky, 476 U.S.79 (1986), and asked for review under Alabama's plain error rule, Rule 39(k), A.R.A.P. The Alabama Supreme Court reviewed the claim, and found no plain error in the record.

Respondent sought post-conviction relief and asserted that counsel was ineffective in 1987 for failing to move for supplementation of the record with data to support the Batson claim. The circuit court denied relief but the Alabama Court of Criminal Appeals reversed, finding counsel ineffective.

The question presented is whether counsel rendered ineffective assistance when he failed to

move to supplement the record in 1987 with information about the racial composition of the 1982 venire and the race of the jurors struck, even though that information only became necessary after 1987, as a result of the subsequent developments in Batson law.

PARTIES

The caption contains the names of all of the parties to the proceedings in the courts below.

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OPINIONS BELOW

The September 30, 1992 opinion of the Alabama Court of Criminal Appeals, reversing the circuit court's denial of post-conviction relief (Alabama Court of Criminal Appeals No. CR-90-989), is not yet reported. The opinion is reproduced as Appendix A in the Appendix volume accompanying this Petition.[1] The November 25, 1992 order of the Alabama Court of Criminal Appeals denying the State's Application for Rehearing is reproduced as Appendix B. The Alabama Supreme Court order granting the State's Petition for a Writ of Certiorari is reproduced as Appendix C. The January 7, 1994 Alabama Supreme Court order quashing certiorari is reproduced as Appendix D. The February 19, 1991 order of the circuit court of Jefferson County denying post-conviction relief is reproduced as Appendix E.

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[1]The Appendix to this Petition is separately bound pursuant to Rule 14.1(k).

JURISDICTION

The order of the Alabama Supreme Court quashing the writ of certiorari was issued January 7, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

Rule 10(f), Alabama Rules of Appellate Procedure, provides:

> Correction or modification of the record.
>
> If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court either before or after the record is transmitted to the appellate court, or the appellate court, on proper suggestion or of its own initiative,

> may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the appellate court.

Rule 39(k), Alabama Rules of Appellate Procedure, provides, in pertinent part:

> In all cases in which the death penalty has been imposed, upon review of the opinion of the court of criminal appeals on certiorari, the supreme court may notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner.

STATEMENT OF THE CASE

Respondent Darryl Travis Watkins was convicted of capital murder and sentenced to death for the 1980 robbery-murder of an elderly man in Birmingham, Alabama. The conviction and sentence were ultimately affirmed by the Alabama courts, and this Court denied certiorari. Respondent sought state post-conviction relief and claimed, among other things, that he was denied the effective assistance of counsel. The circuit court denied post-conviction relief, but

the Court of Criminal Appeals reversed that judgment as to the effective assistance of counsel issue. The Alabama Supreme Court granted the State's petition for a writ of certiorari, but later quashed the writ.

A. Statement Of The Facts From Trial

Respondent murdered 79-year-old Milton Mayfield during a robbery of a meat market in Birmingham, Alabama on November 26, 1980. Respondent shot the victim at close range, after he failed to comply with Respondent's directive to move away from the counter. (R. 171)[2] According to one witness, Mr. Mayfield did not comply because he could not hear over the noise of the meat slicing machine he was operating. (R. 171) Respondent was identified by three eyewitnesses as the man who killed Mr. Mayfield. (R. 170, 235, 246)

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[2] "R. ___" refers to pages of the 1982 trial transcript.

The jury found Respondent guilty and recommended that he receive the death sentence. (R. 382, 410) After another sentence hearing, the trial judge sentenced Respondent to death. (R. 415)

B. Procedural History

Respondent was indicted on April 10, 1981 on a charge of robbery-murder, pursuant to §13A-5-31(a)(2), Code of Alabama (1975)(repealed). J. Louis Wilkinson was appointed to represent him at trial (R. 417), and he represented Respondent throughout the trial and during the convoluted appellate process in the Alabama courts that consumed 5 years.

Initially, the Court of Criminal Appeals affirmed the conviction and sentence. Watkins v. State, 509 So.2d 1056 (Ala.Crim.App. 1983). On certiorari, the Alabama Supreme Court affirmed in part, but ordered remand of the cause for a determination of whether belated disclosure of a police report substantially affected Respondent's

right to a fair trial. Ex parte Watkins, 509 So.2d 1064 (Ala. 1984).

On remand, the trial court found that the belated disclosure of the police report did not substantially affect Respondent's right to a fair trial and that it did not affect the outcome of the trial. On return to remand, the Court of Criminal Appeals incorporated in its opinion the trial court's findings of fact, and affirmed the conviction and sentence. Watkins v. State, 509 So.2d 1067 (Ala.Crim.App. 1985). That Court denied rehearing on January 7, 1986.

On certiorari to the Alabama Supreme Court, Respondent raised, for the first time, a claim that a juror who merely expressed strong disapproval of the death penalty was erroneously struck from the jury. That Court granted the writ and remanded the cause to the Court of Criminal Appeals for examination for this newly raised claim. Ex parte Watkins, 509 So.2d 1071 (Ala. 1986). After remandment, the Court of Criminal Appeals again affirmed the conviction and death sentence, finding that the trial court

did not err in striking the juror for cause. Watkins v. State, 509 So.2d 1071 (Ala.Crim.App. 1986).

On November 26, 1986, following the second remand, Respondent again petitioned the Alabama Supreme Court for a writ of certiorari to review the Court of Criminal Appeals' judgment and, in his February 18, 1987 reply brief, he raised a claim pursuant to the newly released decision, Batson v. Kentucky, 476 U.S. 79 (1986).

The Alabama Supreme Court reviewed the Court of Criminal Appeals' judgment and the newly raised Batson claim, and affirmed. With regard to the Batson claim, the court held that it could not find any plain error based on the record because the record did not raise an inference of discrimination and it did not show that the State exercised any of its peremptory strikes to remove black veniremembers. Ex parte Watkins, 509 So.2d 1074, 1076 (Ala. 1987). This Court denied certiorari. Watkins v. Alabama, 484 U.S. 918 (1987).

On February 15, 1988, Respondent filed a petition for a writ of habeas corpus in the circuit court of Jefferson County. On February 19, 1992, after Respondent filed additional claims and an evidentiary hearing was held, the circuit court denied relief. (Appendix E) With regard to Respondent's claim that counsel on appeal was ineffective because he did not seek to supplement the record pursuant to Rule 10(f), A.R.A.P., to show that black veniremembers were struck, the court held that Rule 10(f) did not apply. It held also that when the Alabama Supreme Court considered the Batson claim on direct appeal, it could have ordered supplementation if it considered supplementation necessary. (Appendix E, p. 28)

Respondent filed an untimely notice of appeal, and the appeal was dismissed as untimely filed. Upon Respondent's motion, the dismissal was set aside and the cause was restored to the Court of Criminal Appeals' docket.

On September 30, 1992, the Court of Criminal Appeals issued an opinion in which it held that

appellate counsel should have moved to supplement the record in the Alabama Supreme Court in 1987 when he raised the Batson claim, and that his failure to do so was deficient performance. The Court of Criminal Appeals remanded the cause for a Batson hearing to provide Respondent with the opportunity to make out a prima facie case of discrimination in the jury selection process. (Appendix A) Two members of the Court of Criminal Appeals dissented from the three-member majority's holding.

On October 14, 1992, the State filed a timely application for rehearing, which the Court of Criminal Appeals overruled on November 25, 1992.

The State petitioned the Alabama Supreme Court for certiorari review on December 9, 1992; certiorari was granted on February 24, 1993. (Appendix C)

On January 7, 1994, the Alabama Supreme Court issued an order quashing the writ as improvidently granted. (Appendix D) Four members of the Alabama Supreme Court dissented,

arguing that when he presented the Batson claim in 1987, counsel raised the issue properly under the law as it existed at that time. (Appendix D, pp. 4-8)

REASON THE WRIT SHOULD ISSUE

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF CRIMINAL APPEALS' JUDGMENT IS IN DIRECT CONFLICT WITH THE OPINIONS OF THIS COURT, OF FEDERAL COURTS, AND OF ALABAMA AND OTHER STATE COURTS, WHICH HOLD THAT EFFECTIVE ASSISTANCE OF COUNSEL DOES NOT INCLUDE A REQUIREMENT TO PRESENT CLAIMS BASED ON HOW THE LAW MAY DEVELOP.

The Court of Criminal Appeals held that, in 1987 when counsel raised a claim pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), on certiorari following the second remand from the Alabama Supreme Court, he should have attempted to supplement the record to show the racial composition of the venire and the race of each veniremember struck by the prosecution in Respondent's 1982 trial. This holding conflicts with the established principles of law announced by this Court, and by federal and state courts, because this Court and others have repeatedly

held that counsel do not have to predict the future development of the law in order to provide effective assistance.

A defendant cannot succeed on an ineffective assistance of counsel claim unless he proves deficient performance by counsel and prejudice. Strickland v. Washington, 466 U.S. 668 (1984). Strickland mandates that when reviewing a claim of ineffective assistance of counsel, the reasonableness of counsel's actions be judged as of the time of counsel's conduct. 466 U.S. at 690. The time of counsel's conduct here is February 18, 1987, when he raised the Batson claim. In his brief on this claim, counsel argued:

> The criteria set out in Batson v. Kentucky, supra, provides that to establish a prima facie case of descrimination [sic] the appellant must show the following:
>
> (1) The appellant is a member of "a cognizable racial group" and "the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."
>
> (2) That "peremptory challenges constitute a jury selection practice that permits 'those to discriminate

who are of a mind to discriminate.'" (This element is a given.)

(3) That the prosecutor excluded veniremen from the jury on the basis of their race.

The appellant argues that he has presented a prima facie case of discrimination, in that he is black and blacks were struck from the venire by the prosecutor's use of peremptory challenges.

Appellant is aware that this issue has not been presented previously, but under the plain error exception to Rule 39(k), A.R.A.P., the appellant would request that this Court review the issue since it has "adversely affected the substantial rights of the petitioner."

(SR. 534-535)[3]

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[3]"SR. ___" refers to pages of the supplemental record in this post-conviction proceeding.

Counsel not only raised a new issue based on a case decided four years after trial, he did so in language that virtually paralleled the language used by this Court in the Batson decision. Counsel's actions at that time were reasonable and, in fact, he succeeded in obtaining plain error review by the Alabama Supreme Court. Ex parte Watkins, 509 So.2d 1074, 1076 (Ala. 1987).[4] This does not support a finding of ineffective assistance of counsel.

The Court of Criminal Appeals held that counsel's performance was unreasonable, however, because when he raised the issue, he did not move to supplement the record with data showing the number of blacks on the venire and race of the veniremembers struck by the prosecution.

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[4]When it reviewed the claim, the court noted that the record did not disclose the prosecutor's strikes or the race of the veniremembers struck, but it did not remand the cause in order for that information to be included in the record, which it could have done at that time. It reviewed the existing record and found no plain error.

(Appendix A, pp. 25-26). The Court of Criminal Appeals stated that this was "necessary" and "desired" Batson information (Appendix A, pp. 11, 14), that the information was proper for a motion pursuant to Rule 10(f), A.R.A.P., and that the motion would have been granted.

In 1982, when Respondent was tried for this robbery-murder, Swain v. Alabama, 380 U.S. 202 (1965), controlled objections to the prosecutor's peremptory challenges as being based on race. The fact that a prosecutor struck any or all black veniremembers in one case did not establish a Swain claim because the proof required under Swain was that the prosecutor systematically excluded all black veniremembers over time. 380 U.S. at 223-224. At the evidentiary hearing in this case, counsel testified that he did not object to the prosecutor's strikes at trial because he did not believe he had a valid objection based on Swain; as a result, the record of the prosecution's peremptory strikes and the racial composition of the venire was not ever

included in the record.[5] (Hearing R. 18, 63-64) It is precisely this information, however, that the Court of Criminal Appeals determined was "necessary" and "desired".

This Court in Batson deliberately avoided formulating particular procedures to be followed in implementing its judgment. 476 U.S. at 99-100 n. 24. The Alabama Supreme Court first announced general guidelines for lower courts in Ex parte Branch, 526 So.2d 609 (Ala. 1987). In Ex parte Branch, the court "set forth the showing required by a defendant in order to raise a Batson challenge". 526 So.2d at 616. Also in Ex parte Branch, the court stated for the first time that the evidence relevant to ruling on a Batson claim "should become a part of the trial record so that there will be a sufficient record for appellate

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[5]The list of veniremembers and the jury strike sheets are not usually included in the trial record. Magwood v. State, 553 So.2d 635, 639 (Ala.Crim.App. 1989); Cochran v. State, 548 So.2d 1062, 1070 (Ala.Crim.App. 1989), cert. denied, 493 U.S. 900 (1989).

review." 526 So.2d at 622. The court also stated that it was simply illustrating the types of evidence, based on recent developments in the case law, that could be used and that, "Certainly, as the law develops, more may be added." 526 So.2d at 625.

Thus, when Respondent was tried in 1982, there were no guidelines for making a Batson claim and there were no guidelines for preserving a record to establish a Batson claim; no guidelines for establishing a Batson claim were set forth in Alabama until 1987.[6] In holding that trial counsel's performance was deficient because he failed to put forth the "necessary Batson information" when no court had yet determined what information was necessary, the

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[6]Over two years later, the Alabama Supreme Court acknowledged that, despite the attempt made in Ex parte Branch to avert confusion, there had nonetheless been "a great amount of confusion over the interpretation to be given to Batson". Harrell v. State, 555 So.2d 263, 265 (Ala. 1989)(further attempting to clarify Batson analysis).

Court of Criminal Appeals found counsel ineffective because he failed to forecast changes in the law. This decision is irreconcilable with established precedent.

In Strickland v. Washington, this Court clearly stated that a fair assessment of counsel's performance requires an evaluation of counsel's actions from counsel's perspective at the time, with every effort made to "eliminate the distorting effects of hindsight." 466 U.S. at 689. In Smith v. Murray, 477 U.S. 527 (1986), this analysis was applied. After counsel in that case chose not to even pursue a claim on appeal that later case developments suggested would have succeeded, this Court refused to find counsel ineffective, and instead reiterated from Strickland v. Washington the standard that a fair assessment of attorney performance requires an evaluation of his conduct from counsel's perspective at the time.

Numerous federal courts of appeal have followed this mandate and have held that effective representation does not include the

requirement to predict future developments in the law. E.g., Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989) (counsel not ineffective for failing to object to imposition of death penalty for unintentional murder, because Enmund v. Florida, 458 U.S. 782 (1982), questioning imposition of death penalty for felony murder had not yet been decided), cert. denied, 113 S.Ct. 374 (1992); Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), modified, 833 F.2d 250 (1987) (failure to object at trial to reinterrogation in conjunction with Miranda warnings before Michigan v. Mosley, 423 U.S. 96 (1975) was released not ineffective), cert. denied, 108 S.Ct. 1487 (1988); Procter v. Butler, 831 F.2d 1251 (5th Cir. 1987) (counsel not ineffective for failing to make Batson objection in 1976 trial), cert. denied, 482 U.S. 916 (1988).

In addition, Alabama courts have properly refused to find counsel ineffective for failing to predict future developments in the law. E.g., State v. Tarver, No. CR-91-1494, slip op. at 3-4 (Ala.Crim.App. March 26, 1993)(counsel not

ineffective for failing to make a Batson objection in a pre-Batson case), aff'd on return to remand (Ala.Crim.App. February 11, 1994); Duren v. State, 590 So.2d 360, 365 (Ala.Crim.App. 1990)(counsel not ineffective for failing to object to victim impact argument because Booth v. Maryland, 482 U.S. 496 (1987) was decided three years after trial), aff'd, 590 So.2d 369 (Ala. 1991); Magwood v. State, 553 So.2d 635, 638 (Ala.Crim.App. 1989)(counsel not ineffective for failing to raise a Batson objection in 1982 trial), cert. denied, 553 So.2d 635 (Ala. 1989)[7]

Not only did the Court of Criminal Appeals in this case condemn counsel for his inability to predict the substantial developments in Batson

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[7]The Court of Criminal Appeals in Magwood also held that, even though the direct appeal was pending when Batson was announced, counsel was not ineffective for failing to even raise a Batson issue or to move to supplement the record on appeal with the racial composition of the venire or the race of the jurors struck. 553 So.2d at 639-640. Counsel in the present case surpassed the performance of Magwood's counsel by raising the Batson issue on appeal, yet he was found ineffective while Magwood's counsel was not!

law, but the court's own analysis is based almost exclusively on recently decided cases that, themselves, apply the procedural developments in Batson law that did not exist in 1987 when counsel raised his Batson claim. (Appendix A at 23-26) The court's citation to several recent cases which have been remanded for Batson hearings vividly emphasizes the error in the Court of Criminal Appeals' decision, that is it refused to evaluate counsel's conduct from his perspective at the time and it instead specifically relied on the 20/20 vision hindsight so often provides.

The Court of Criminal Appeals' failure to "eliminate the distorting effects of hindsight" which Strickland v. Washington, 466 U.S. at 689 requires further contributed to the anomalous, unjust result that the court reached in this case.

Courts in other states also follow Strickland v. Washington, and refuse to find counsel ineffective for failing to predict future legal developments. See, e.g., Hall v. State, 853 S.W.2d 756, 759 (Tex.App. 1993); Commonwealth

v. Polston, 420 Pa. Super. 233, 234, 616 A.2d 669, 680 n. 5 (1992).

The analysis applied by the Court of Criminal Appeals in this case cannot be reconciled with the analysis followed by this Court, federal circuit courts, courts in other states, and Alabama courts in other cases, which have consistently refused to hold counsel's performance ineffective for failing to forecast developments in the law. Accordingly, review of the decision below is necessary to ensure that the Alabama Court of Criminal Appeals applies the standards set forth by this Court in Strickland v. Washington in the same manner as this Court and the federal courts of appeal do, and in the same way Alabama's and other states' courts have applied the test in other ineffective assistance of counsel cases.

The decision below, if allowed to stand, will have a substantial adverse effect on the administration of justice and on the finality of judgments in Alabama. Each year, thousands of convicted criminals file post-conviction

proceedings in state and federal courts and raise ineffective assistance of counsel claims. If the Strickland v. Washington standards are ignored and defendants can succeed on claims based purely on hindsight and developments in the law that occurred months or years after trial, the sense of finality due to criminal judgments will be seriously compromised. The concept of providing reasonably effective assistance of counsel under the circumstances of the case will have no meaning, because all Alabama courts will be free to judge counsel's conduct by whatever law exists when the case is presented to that court for post-conviction review. The decision below therefore merits the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MELISSA G. MATH
DEPUTY ATTORNEY GENERAL

April, 1994

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ON PETITION FOR WRIT OF CERTIORARI TO THE
ALABAMA COURT OF CRIMINAL APPEALS

APPENDIX TO THE PETITION OF THE STATE OF ALABAMA

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APPENDIX A

OPINION OF THE ALABAMA COURT OF CRIMINAL APPEALS

[STAMP] RELEASED, SEPT. 30, 1992
CLERK, ALA. COURT OF CRIMINAL APPEALS

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1991-92

CR-90-989

Darryl Travis Watkins

v.

State

Appeal from Jefferson Circuit Court
(CC-81-937)

PATTERSON, PRESIDING JUDGE

The petitioner, Darryl Travis Watkins, appeals from the circuit court's denial of his petition for post-conviction relief pursuant to A.R.Cr.P. Temp. 20. In 1982, the petitioner was convicted, after a jury trial, of the capital offense of murder committed during the course of a robbery, in violation of §13A-5-31, Code of Alabama 1975, and he was sentenced to death. His conviction and sentence were affirmed on appeal. See Watkins v. State, 509 So. 2d 1056 (Ala. Cr.

App. 1983), remanded, 509 So. 2d 1064 (Ala.) (for determination of whether belated disclosure of a police report substantially affected the petitioner's right to a fair trial), on remand, 509 So. 2d 1067 (Ala. Cr. App. 1984), on return to remand, 509 So. 2d 1067 (Ala. Cr. App. 1985) (conviction and sentence again affirmed), remanded, 509 So. 2d 1071 (Ala.) (for resolution of newly asserted issue of whether venireperson who merely expressed strong disapproval of death penalty was erroneously excused by the granting of a challenge for cause), on remand, 509 So. 2d 1071 (Ala. Cr. App. 1986) (conviction and sentence again affirmed), aff'd, 509 So. 2d 1074 (Ala.), cert. denied, 484 U.S. 918 (1987).

Watkins now raises numerous issues regarding the denial of his Rule 20 petition, some of which are of arguable significance since they were merely mentioned in footnotes. However, we need address only the following issues: (1) whether the petitioner's counsel was ineffective at trial for failing to take action to have the record reflect that the prosecution improperly struck

black venirepersons in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and (2) whether counsel was ineffective on appeal for failing to supplement the record before the Alabama Supreme Court with facts to support his Batson argument. We note that trial counsel also served as appellate counsel.

The petitioner raised these contentions that his counsel was ineffective because, he says, counsel failed to meet the standard set out in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court articulated the standard for judging the effectiveness of counsel within the framework of the Sixth Amendment of the United States Constitution. The Court provided the following two-part test to determine whether "counsel's assistance was so defective as to require reversal of a conviction or death sentence," id. at 687:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.

> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

Id. To show that counsel's performance was "deficient," a defendant must show that counsel's assistance was unreasonable considering all the circumstances. Id. at 688. Counsel's conduct is to be "viewed as of the time of ... [the] conduct." Id. (Emphasis added.) To show that he was "prejudiced" by counsel's conduct, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

I.

In his petition and at the hearing on that

petition, the petitioner argued that counsel, at trial, should have had the record reflect the racial composition of the venire and the race of each venireperson struck by the state so that, on direct appeal, he could have successfully presented a Batson v. Kentucky, 476 U.S. 79 (1986), argument.

The petitioner was tried four years before Batson was decided. However, because Batson is applied retroactively to cases on direct appeal when the Batson opinion was issued, Ex parte Jackson, 516 So. 2d 768 (Ala. 1986), the petitioner raised a Batson claim during his last appeal before the Alabama Supreme Court, and that court chose to address the issue. See Ex parte Watkins, 509 So. 2d 1074 (Ala. 1987). In disposing of this claim adversely to the petitioner, the court stated the following:

> "[W]e have carefully reviewed the record in this respect and we cannot find any plain error. Although the record does show that the defendant is black and victim was white, it does not show that the state exercised any of its peremptory challenges to remove prospective black jurors from the venire. The record as a whole simply does not raise an inference that the

> state was engaged in the practice of purposeful discrimination. ... The defendant cannot successfully argue that error is plain in the record when there is no indication in the record that the act upon which error is predicated ever occurred (i.e., the state's use of its peremptory challenges to exclude blacks)."

Id. at 1076-77. The petitioner argued in the Rule 20 proceeding that, had the appellate record shown that the prosecution exercised its peremptory challenges to remove 13 of the 14 black veniremembers, this issue would not have been decided adversely to him on appeal.[1]

---

[1]At the evidentiary hearing, defense counsel first testified that the prosecution used 12 of its 13 strikes to excuse 12 of the 13 black veniremembers. Counsel later testified that the prosecution exercised 13 of its 14 strikes to excuse 13 of the 14 black veniremembers. However, our reading of Exhibit 11 (defense co-counsel's personal strike list and a list of all persons summoned for that week's jury service) reveals that 13 blacks were on the venire and that the prosecution used 12 of its 13 strikes to excuse 12 blacks. For purposes of this opinion, we will assume that the "12 of 13" description is the correct one.

In rejecting the petitioner's claim that trial counsel was ineffective in this regard, the circuit court found the following:

> "The [c]ourt finds that the jury in this case had only one black member and the [s]tate used peremptory challenges to exclude a number of blacks from the jury. The evidence presented indicates that the defendant could have made out at least a prima facie case that the [s]tate used peremptory challenges to improperly exclude blacks from Petitioner's jury by what is now generally referred to as a Batson motion. However, it must be noted that this trial preceded Batson by four years. Trial counsel was not ineffective by failing to make record upon which this claim could later be raised and was not ineffective for failing to object to this under the state of the law at the time of trial. This issue was raised on direct appeal after the decision in Batson v. [Kentucky], 476 U.S. 79 (1986)."

"A counsel's pre-Batson failure to raise a Batson-type claim does not fall below reasonable standards of professional competence, and thus does not render counsel's assistance constitutionally ineffective." Pitts v. Cook, 923 F.2d 1568, 1574 (11th Cir. 1991). See James v. State, 564 So. 2d 1002 (Ala. Cr. App. 1989); Morrison v. State, 551 So. 2d 435 (Ala. Cr. App. 1989), cert. denied, 495 U.S. 911 (1990). See

also Poole v. United States, 832 F.2d 561 (11th Cir. 1987), cert. denied, 488 U.S. 817 (1988). Counsel, therefore, cannot be faulted for not having prepared the record in a pre-Batson trial (by four years) to support a Batson claim. See Thompson v. State, 581 So. 2d 1216, 1236 (Ala. Cr. App. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 868 (1992) (counsel not ineffective for failing to act on possible future developments in law). Counsel did not have duty to file a fully adequate record until after Batson was decided, as will be discussed below.

II.

The petitioner further argued that counsel was ineffective on appeal because, when asserting the Batson claim before the Alabama Supreme Court, he failed to move to supplement the record to show the racial composition of the venire and the race of each venireperson struck by the prosecution, in order to factually support the Batson claim and, thus, present plain error. In

finding this allegation to have no merit, the circuit court stated the following:

> "It is the Court's opinion that [A.R.App.P. 10(f)] is not applicable because the matter sought to be added was not omitted by error, accident or misstatement. It is also clear that the Appellate Court on its own initiative could order this correction if it consider it necessary or appropriate."

In addressing this issue, we are mindful of the following:

> "[E]very criminal trial must conform to constitutional standards, [and] our scrutiny in capital trials must be particularly sensitive. Capital trials are unique and ponderous occurrences, distinct from any other exercise of state power. When the machinery of the state seeks to extinguish a life, we

> must especially ensure that the process employed to accomplish that end complies with the defendant's right to a fair trial by an impartial jury."

Brown v. State, 571 So. 2d 345, 352 (Ala. Cr. App.), writ quashed, 571 So. 2d 353 (Ala. 1990), vacated, ___ U.S. ___, 111 S.Ct. 2791, on remand, 586 So. 2d 991 (Ala. Cr. App. 1991), rev'd, [Ms. 1901839, April 10, 1992] ___ So. 2d ___ (Ala.), remanded, [Ms. 3 Div. 964, September 18, 1992] ___ So. ___ (Ala. Cr. App. 1992) (quoting Trujillo v. Sullivan, 815 F.2d 597, 606-07 (10th Cir.), cert. denied, 484 U.S. 929 (1987)).

We analyze the issue before us with the following considerations: First, Batson was decided before the petitioner's third and last appeal to the Alabama Supreme Court. Second, Batson is to be applied retroactively to all cases pending on direct appeal when that decision was handed down by the United States Supreme Court, and the petitioner's counsel was aware of this fact, because he in fact raised this issue

before the Alabama Supreme Court. See Ex parte Watkins, 509 So. 2d 1074. Third, because appellate counsel also had served as trial counsel, he knew or should have known the racial composition of the venire and the race of each venireperson struck by the prosecution. In fact, he testified at the Rule 20 hearing that the prosecution exercised 13 of its 14 strikes to remove 13 of the 14 black veniremembers, an assertion not disputed by the state at the hearing or on appeal. Fourth, because counsel served as trial as well as appellate counsel, he knew or should have known that the appellate record did not reflect the necessary Batson information and, therefore, that it would not support the Batson claim before the Alabama Supreme Court. Finally, after reviewing the materials filed in the supreme court in regard to this case and that court's opinion, 509 So. 2d 1074, we find no indication that counsel moved to supplement the record. We recognize that while it is a fundamental principle that assertions in brief are not cognizable by an appellate court,

see Webb v. State, 565 So. 2d 1259 (Ala. Cr. App. 1990), we note than even counsel's assertions in his brief to the Alabama Supreme Court did not put that court on notice of any facts upon which to judge the existence of a Batson claim. Absolutely no factual support for a Batson claim was asserted, other than the fact that the petitioner is black.

The attorney general argues and the trial court found that A.R.App.P. 10(f), then in effect (superseded by A.R.App.P. 10(g), dated August 27, 1991, and applicable to proceedings in which notice of appeal is filed on or after October 1, 1991), does not provide a procedure for supplementing the record with anything not "omitted from the record by error or accident." The attorney general reasons that, because the strike list was not a necessary part of this or any record in 1982, the strike list was omitted intentionally -- not erroneously or accidentally. He further asserts that the petitioner has not established that he was prejudiced by his counsel's failure to move to

supplement the record because, he argues, the petitioner has failed to prove that there is a reasonable probability that the Alabama Supreme Court would have granted a Rule 10(f) motion had one been filed.

Rule 10(f) stated the following:

"If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court either before or after the record is transmitted to the appellate court, or the appellate court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be

certified and transmitted. All other questions as to the form and content of the record shall be presented to the appellate court."

This rule is obviously tempered, particularly in a death penalty case, by the provision in Rule 1 that the Alabama Rules of Appellate Procedure "shall be construed so as to assure the just, speedy, and inexpensive determination of every appellate proceeding on its merits." Moreover, Rule 2(b) provides that, "[i]n the interest of expediting decision, or for other good cause shown, an appellate court may suspend the requirements or provisions of any of these rules [, except Rules 4(a)(1) and 39(b),] in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction."

Contrary to the attorney general's argument, we fail to see the significance of any reason why the desired Batson information was not included in the record when the record was first submitted

to the court. Rather, we consider it important that, when counsel asserted the Batson argument to the Alabama Supreme Court, the Batson information (1) was proper for a Rule 10(f) motion in the sense that it is "what occurred" in the trial court, see Thomas v. State, 550 So.2d 1057, 1062 (Ala.Cr.App.), aff'd, 550 So. 2d 1067 (Ala. 1989); (2) was obviously available and undisputed;[2] and (3) was crucial to a review of the issue by the Alabama Supreme Court.

Rule 10(f) has been liberally construed, as the court in Weaver v. State, 401 So.2d 344, 348 (Ala.Cr.App. 1981), explained as follows:

---

[2]We so conclude from the following facts: (1) the instant record evidences existing documents (petitioner's exhibit no. 11) that reflect the strikes and the races of the excluded veniremembers and jurors, and (2) the information was in no way disputed by the prosecution or refuted by any evidence. See also James v. State, 564 So.2d 1002, 1005 (Ala.Cr.App. 1989) (in establishing his burden for his claim of trial counsel's ineffectiveness for failing to assert a Batson claim, the appellant presented testimony from the circuit clerk pertaining to the prosecution's use of its strikes).

"By its plain wording Rule 10(f) extends broad coverage and protection to the parties in having material omissions of 'what occurred' added to the record. Moreover, Rule 10(f) provides broad power in the appellate courts to direct that omissions be corrected to determine 'all other questions as to the form and content of the record.'

"....

"...[We are] mindful that Rule 10(f) provides broad leeway in making the record conform to the truth, 'and mindful that the appellate rules' shall be construed so as to assure the just ... determination of every proceeding on its merits'...."

We must take the liberty, in this case, of speculating how the Alabama Supreme Court would have treated a Rule 10(f) motion, or the like, had the petitioner's counsel filed one. However, we are not completely without guidance in this determination. In Edwards v. State, 287 Ala. 588, 253 So.2d 513 (1971), the appellant, before submission, had filed a petition for certiorari review to correct the record, alleging, among other things, that the transcript pertaining to the proceedings concerning the trial court's qualification of jurors on the matter of capital punishment was incomplete; "before submission pursuant to said petition a writ of certiorari [had been] granted commanding the Clerk ... to make a diligent search of the records and procedure and to certify a full, complete transcript" of the requested items, id. at 593, 253 So.2d at 518; and the clerk instead had filed a certificate stating, in pertinent part, "The Presiding Judge did qualify the jury as to capital punishment but no one was excused for this qualification," id. at 592, 253 So.2d at

517. Upon submission to the Alabama Supreme Court, the appellant complained in brief that veniremembers had been excused in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), which was released 14 months after the appellant's trial. He further asserted that he remembered that certain veniremembers had been excused because they had stated that they did not believe in capital punishment. Based on the clerk's certificate and on the absence of a transcript of the actual proceedings, the Alabama Supreme Court held, "[W]e cannot say that there was a violation of the rule pronounced in Witherspoon, supra." 287 Ala. at 592, 253 So.2d at 517. Then, the procedural history progressed as follows:

> "On rehearing, the appellant presented strong argument pertaining to this court's treatment of the matter of the qualification of jurors concerning capital punishment. ...
>
> "On April 8, 1971, upon reconsideration of this matter this Court held that such language in the certificate of said Clerk was not responsive to the writ; constituted an unacceptable conclusion; and was merely a narrative statement. The court then withdrew its original opinion and directed the Clerk

of this Court to issue a supplementary writ of certiorari requiring the Clerk of the Circuit Court of Sumter County to return to this Court a full, true and complete transcript of the proceedings pertaining to the qualification of the jurors concerning capital punishment."

Id. at 593, 253 So.2d at 518. The court offered the following explanation for these actions:

"The Supreme Court of the United States in Witherspoon v. Illinois, ... stated the following:

"'... a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. ...'

"This Court is of the opinion that it is implicit in the Witherspoon holding that a full and complete transcript adequate for the purposes of appellate review must contain the proceedings incident to the selection and qualification of the jurors pertaining to capital punishment. Therefore, in order to determine whether the requirements of Witherspoon are met, neither this Court nor the trial courts should give force to any statutory authority, rule of court, or prior decision of this Court which would authorize the omission from the transcript of that portion of the

> proceedings pertaining to the qualification of jurors concerning capital punishment."

Id. at 595, 253 So.2d at 520.

By analogy, we believe that the Alabama Supreme Court would have granted a Rule 10(f) motion in the instant case had one been filed. In reaching this conclusion, we consider to be worthy of great emphasis the following mandate by the Edwards court: "[A] full and complete transcript adequate for the purposes of appellate review must contain the proceedings incident to the selection and qualification of the jurors." Although the court qualified this directive by noting that it applied to the selection and qualification "pertaining to capital punishment," we believe the Alabama Supreme Court would find the directive to be no less applicable here. Emanating from this mandate in Edwards are two additional messages, which we have also considered in reaching our conclusion: (1) "a full and complete transcript adequate for the purposes of appellate review" of a constitutional issue affecting the validity of a death sentence

is so necessary that the court will go to great lengths, as it did in Edwards, to obtain an adequate record for review, and (2) the Alabama Supreme Court will not give any force to any authority that would authorize the omission from the transcript of any portion of the proceedings pertaining to such an issue. Cf. Huntley v. State, [Ms. 1910530, September 18, 1992] ___ So.2d ___, ___ (Ala. 1992) (wherein the court held that "considerations of judicial economy require a record of all the evidence bearing on the issue of alleged discrimination") (emphasis in original).

We find further support for our conclusion that there is a reasonable probability that the Alabama Supreme Court would have granted a Rule 10(f) motion in Ex parte Godbolt, 546 So.2d 991, 997-98 (Ala. 1987). There the court recognized as "sound" the approach expounded in United States v. Selva, 559 F.2d 1303, 1306 (5th Cir. 1977), that where trial counsel is also appellate counsel and where the record on appeal is incomplete, the conviction will be reversed if

the appellant makes "a specific showing of prejudice -- i.e., appellant must show that failure to record and preserve the specific portion of the trial proceedings visits a hardship upon him and prejudices his appeal." The Selva court explained the rationale of this rule as follows:

> "When a defendant is represented on appeal by the same attorney who defended him at trial, the court may properly require counsel to articulate the prejudice that may have resulted from the failure to record a portion of the proceedings. Indeed, counsel's obligation to the court alone would seem to compel him to initiate such disclosure. The attorney, having been present at trial, should be expected to be aware of any errors or improprieties which may have occurred during the portion of the proceedings not recorded."

559 F.2d at 1306 (quoted in Godbolt, 546 So.2d at 997; emphasis added). By adopting Selva as "sound," the Alabama Supreme Court appears to have signaled that, in a situation such as the one presented here, it would expect that, because of counsel's obligation to the court, counsel would be compelled to initiate disclosure of any prejudicial errors that may have occurred below,

but that may not have been recorded. Cf. Robinson v. State, 441 So. 2d 982, 988 (Ala. Cr. App. 1983) (wherein the court stated that "[c]ounsel for an appellant ... is not to be absolved of all responsibility in submitting a case on appeal without first having determined whether the record proper and the reporter's transcript of the proceeding reflect all of the proceedings in the trial court that are necessary for a proper disposition in the appellate court of any and all issues raised by appellant").

We have resorted to one further consideration in concluding that the Alabama Supreme Court would have probably granted a Rule 10(f) motion: fundamental fairness. Numerous death penalty cases have been remanded to the trial court for a Batson hearing where no objection was presented to the trial court, but where apparently by chance, the record contained sufficient Batson information to reflect plain error. See, e.g., Ex parte Adkins, 600 So.2d 1067 (Ala. 1992); Ex parte Bankhead, 585 So.2d 112, 117 (Ala. 1991); Freeman v. State, [Ms.

90-279, September 18, 1992] ___ So.2d ___ (Ala.Cr.App. 1992); Guthrie v. State, [Ms. 7 Div. 287, June 12, 1992] ___ So.2d ___ (Ala.Cr.App. 1992); Walker v. State, 586 So.2d 49 (Ala.Cr.App. 1991). Even more compelling here is the death penalty case of Parker v. State, 587 So.2d 1072, 1077 (Ala.Cr.App. 1991), where the court found that the record on appeal did not support the appellant's argument on direct appeal "that the prosecutor used peremptory strikes to remove eight of the nine black members of the venire." Yet, relying on Ex parte Bankhead, the court noticed the matter under the "plain error doctrine" and remanded for a Batson hearing. See also Nickerson v. State, 539 So.2d 337 (Ala.Cr.App. 1987) (wherein the court remanded a noncapital conviction where the record reflected that five blacks were on the venire and that counsel, in his mistrial motion, merely asserted that the prosecution struck blacks). Cf. Duncan v. State, 575 So.2d 1198 (Ala.Cr.App. 1990), cert. denied, 575 So.2d 1208 (Ala. 1991) (wherein the court, "out of an abundance of caution

because this case involves the death penalty," remanded the cause for a Batson hearing despite the fact that, at that time, the white appellant had no cognizable standing to assert the issue). But see Freeman v. State, 555 So. 2d 196, 214-15 (Ala. Cr. App. 1988), aff'd 555 So. 2d 215 (Ala. 1989), cert. denied, 496 U.S. 912 (1990) (wherein, in a death penalty case, the court found that a Batson issue was not properly before the court because the jury strike list attached to a Rule 10(f) motion denied by the trial court should not be considered, because the designations of race on the list are merely assertions of counsel unsupported by the record, and because, during a hearing on the motion, the trial court found that no record of the voir dire examination exists). Compare Smith v. State, 588 So. 2d 561, 582-83 (Ala. Cr. App. 1991) (wherein the court ordered that the record in this death penalty case should be supplemented with regard to jury strikes where defense counsel, in a motion for new trial, implied without contest that the prosecution had struck a number of

blacks and where the record on appeal was not correctly supplemented after the trial court had granted the appellant's Rule 10(f) motion). It would seem that, in consideration of these cases, the petitioner -- had he filed a motion to supplement the record -- would not have been arbitrarily thwarted in effectively asserting a Batson issue under the "plain error doctrine" because simply either (1) evidence of that violation, indisputably in existence, was not, by chance, included in the record when it was originally submitted, or (2) the Alabama Supreme Court would have ignored the standard to which other appellants had been held. Finally, we note that the petitioner's co-defendant received a new trial as the result of the prosecution's failure to meet its Batson burden. Raines v. State, 515 So.2d 82 (Ala.Cr.App. 1987). Cf. Ex parte Floyd, 571 So.2d 1234, 1236 n. 3 (Ala. 1990) (wherein, in reviewing the denial of a Rule 20 petition on a death penalty conviction, the court held that Floyd's Batson claim asserted, but not reviewed, in a petition for writ of certiorari to the

United States Supreme Court on direct appeal should be reviewed in the Rule 20 proceeding, since "[t]he application of Griffith v. Kentucky, 479 U.S. 314 (1987) [(holding that Batson applies to all cases pending on direct appeal)] would seem to be especially applicable in a death case, and especially in view of the fact that Batson was applied to one of petitioner's co-defendants").

We find that the petitioner did not have to show any prejudice other than the reasonable probability that the Alabama Supreme Court would have granted his [sic] a motion to supplement the record to show that a Batson hearing was warranted had one been made. See Ex parte Yelder, 575 So.2d 137, 139 (Ala. 1991) (wherein the Alabama Supreme Court carved out an exception to the Strickland requirement that prejudice be affirmatively proved by holding that "the failure of trial counsel to make a timely Batson objection to a prima facie case of purposeful discrimination by the State in the jury selection process through it [sic] use of peremptory

challenges is presumptively prejudicial to a defendant"). With the requested evidence in the record, the record would have clearly supported a finding that the petitioner was entitled to a Batson hearing, and we believe that the Alabama Supreme Court would have unquestionably remanded. In the recent case of Huntley v. State, ___ So.2d at ___, the Alabama Supreme Court held that, "[u]pon the exercise of the prosecution's first peremptory challenge of a black veniremember, a defendant is entitled to a Batson hearing." It further stated that, "if it determines that an inference [of discrimination] clearly exists, [it] will not hesitate to remand a cause to the trial court with directions to examine the State's explanations." Id. at ___.

We note that the court in Magwood v. State, 553 So. 2d 635 (Ala. Cr. App. 1989) (wherein the petitioner petitioned the circuit court for a writ of error coram nobis), was confronted with a situation similar to the instant case. In Magwood, this court noted the following:

> "Magwood contends that a Batson claim should have been raised on rehearing

before the Alabama Supreme Court. He argues that that court would have considered the issue if his counsel had 'supplemented' the record. He reasons that if a claim had been so raised, a hearing might have been obtained. The trial record does not support the contention that there would have been a Batson issue, and we can do no more that speculate on the outcome. The record proper does not include the data which Magwood now contends might have given him an issue.

"Based on what a supplemental record might show, we cannot conclude that the second prong of Strickland would have been met. We cannot conclude that the outcome would have been different.

"Based on this record, there is no Batson issue presented. It is clear that under the rule of the Swain case, counsel's performance was not ineffective. The case was on rehearing before the Alabama Supreme Court. Should counsel, at that point, have asked to supplement the record? Part of the record that was omitted is the only thing that could have been added to the record. There was a later effort to secure from the clerk's office data that were not part of the record proper. Under the most liberal reading of the word 'record,' it is extremely doubtful that the data concerning the racial makeup of the venire and the race of the jurors struck could be considered part of the record. Even if these data were considered to be part of the record, this does not mean that there was a Batson violation."

Id. at 639. We distinguish Magwood because Magwood, as it applies the Strickland test to Batson challenges, is no longer the law. See Ex parte Yelder (wherein the court held that when counsel fails to raise a Batson objection at trial, prejudice will be presumed). In light of the Edwards principles discussed above, we further disclaim the language that "it is extremely doubtful that the data concerning the racial makeup of the venire and the race of the jurors struck could be considered part of the record."

Thus, we conclude that based on the knowledge that counsel possessed or should have possessed at the time of the petitioner's appeal in which he raised Batson, counsel should have moved to supplement the record before the Alabama Supreme Court, and any failure to do so was deficient performance within the meaning of Strickland v. Washington. Compare Cochran v. State, 548 So. 2d 1062, 1070 (Ala. Cr. App.), cert. denied, 493 U.S. 900 (1989) (wherein the court held that appellate counsel was not

ineffective for failing to raise a Batson issue where the trial record did not suggest factual support for such issue and where there was no indication that appellate counsel, who had not represented petitioner at trial, should have been aware that matters outside the record might prove a Batson violation). Because counsel failed to move to supplement the record to show that the prosecution exercised 12 of its 13 peremptory challenges to remove 12 of 13 blacks from the venire, the petitioner was in effect denied the opportunity to have his Batson argument reviewed by the Alabama Supreme Court. Thus, the trial court erred by denying the petitioner's Rule 20 petition on this ground.

As we began this discussion, we so conclude: "When the machinery of the state seeks to extinguish a life, we must especially ensure that the process employed to accomplish that end complies with the defendant's right to a fair trial by an impartial jury." Brown, 571 So.2d at 352. Because of counsel's failure to have the record supplemented, we are not so ensured; we

cannot say that the process employed to accomplish the penalty of death, in this case, complied with the petitioner's right to a fair trial by an impartial jury.

> "The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. ... This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' ... and places the fairness of a criminal proceeding in doubt."

Powers v. Ohio, ___ U.S. ___, ___, 111 S.Ct. 1364, 1371 (1991) (citations omitted; quoted in Ex parte Adkins, 600 So.2d at 1069).

Because we do not know yet whether the petitioner's trial was marred by purposeful racial discrimination, see Yelder v. State, 575 So.2d 131, 136 (Ala. Cr. App. 1990) (Bowen, J., dissenting), we remand this cause to the circuit court to hold a Batson hearing to provide the petitioner the opportunity to present all available evidence of a prima facie case of

discrimination and, if that evidence raises an inference of discrimination, to give the prosecution the opportunity to justify its challenges. See Ex parte Huntley, ___ So.2d at ___. The circuit court shall take all action directed in sufficient time to permit the circuit clerk to make a proper return to this court at the earliest possible time within 60 days of the release of this opinion. In the event that the court finds no Batson violation, the return to remand shall include a transcript of the remand proceedings and the circuit court's specific findings of facts. The parties, of course, do not relinquish their respective positions regarding the other issues raised on appeal, and this court reserves comment on them until a proper return is made to this court.

REMANDED WITH DIRECTIONS.

BOWEN, J., McMILLAN, J., CONCUR; TAYLOR, J., DISSENTS WITH OPINION; MONTIEL, J., DISSENTS WITH OPINION.

TAYLOR, JUDGE DISSENTING

I dissent from the decision of the majority, which concludes that appellate counsel rendered ineffective assistance by failing, when this cause was pending before the Alabama Supreme Court, to move, pursuant to Rule 10(f), A.R.App.P. (now rule 10(g), A.R.App.P), to supplement the record with the transcript of the voir dire examination of the prospective jurors.

This decision conflicts with the reasoning and result of James v. State, 564 So.2d 1002 (Ala. Cr. App. 1989). In James, this court held that trial counsel did not render ineffective assistance in not making a motion pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). James was tried before the Batson decision was released. This court on many occasions has declined to hold assistance of counsel ineffective for not forecasting changes in the law. James, supra; Morrison v. State, 551 So.2d 435 (Ala. Cr. App. 1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990), and cases cited therein. "The devil himself knoweth not the mind of man."

At the time of the trial in this case, Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), was the law.

> "Under Swain, a defendant alleging that the prosecution exercised its peremptory challenges to discriminate unlawfully against a particular group had to demonstrate that the State had systematically excluded members of that group from juries over a period of time."

James, 564 So.2d at 1005. When a defendant was tried under the rules applicable in Swain, there was no procedure to preserve a record such as that contemplated under the Batson decision. With that in mind, I conclude that appellate counsel's assistance was not made ineffective by the failure to move to supplement the record on appeal. At that time, the procedures for establishing a "Batson violation" did not exist. It would be strange indeed if counsel had proceeded to suggest, and then had been allowed to establish a prima facie case, according to judge-made law that was then only a gleam in the eye. If there is in the record of the voir dire examination something that may be pertinent, the appellant is entitled to have it considered. If

that is the situation, this court, on its own motion, should send this cause back for the circuit court to supplement the record. In my opinion, appellate counsel did not render ineffective assistance of counsel as defined by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

MONTIEL, JUDGE DISSENTING.

I respectively [sic] dissent from the majority's conclusion that the petitioner received ineffective assistance of counsel for counsel's failure to move to supplement the record pursuant to Alabama Rules of Appellate Procedure 10(f) before the Alabama Supreme Court. Rule 10(f) is applicable to situations where matters have been "omitted from the record by error or accident" Rule 10(f) is not intended to supplement the record because of changes in the law that have occurred since the time of trial.

It is apparent from the record and review of this case that the petitioner received a fair trial and was provided with effective assistance

of counsel pursuant to the Sixth Amendment to the United States Constitution.

APPENDIX B

COURT OF CRIMINAL APPEALS
ORDER OVERRULING APPLICATION FOR REHEARING

STATE OF ALABAMA
JUDICIAL BUILDING, 445 DEXTER AVENUE
MONTGOMERY 36130-1555

WILLIAM M. BOWEN, JR.
Presiding Judge
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
MARK G. MONTIEL
Judges

Court of Criminal Appeals No. 90-989
(Jefferson Circuit Court No. 81-937)

Darryl Travis Watkins vs. **State of Alabama**
Appellant **Appellee**

Dear Sir or Madam:

You are hereby notified that on **November 25,** 1992, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing **overruled.**

LANE MANN
CLERK
COURT OF CRIMINAL APPEALS

Hon. Melissa Math
Assistant Attorney General

Hon. Kevin M. Doyle
Hon. Bryan A. Stevenson
158 Lucerne Boulevard
Birmingham, AL 35209

APPENDIX C

ALABAMA SUPREME COURT ORDER GRANTING CERTIORARI

THE STATE OF ALABAMA---------JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

February 24, 1993

1920417

Ex parte State of Alabama. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Darryl Travis Watkins v.State) (90-989) (Jefferson: CC-81-937)

NOTICE

Petition for writ of certiorari to the Court of Criminal Appeals is granted. See Rule 39(f) and (h), Alabama Rules of Appellate Procedure, for instructions regarding the filing of additional briefs and oral argument.

PER CURIAM - Hornsby, CJ., ALMON, ADAMS, STEAGALL & INGRAM, JJ.

PLEASE USE THE ABOVE CASE NUMBER ON ALL FILINGS IN CONNECTION WITH THIS CASE.

[STAMP]

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 24th day of Feb. 1993.

/s/Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX D

OPINION OF THE SUPREME COURT OF ALABAMA

[STAMP] RELEASED, JAN. 7, 1994
CLERK, SUPREME COURT OF ALABAMA

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1993-94

1920417

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: Darryl Travis Watkins

v.

State)

(Jefferson Circuit Court, CC-81-937;
Court of Criminal Appeals, CR-90-989)

PER CURIAM.

After carefully reviewing the record, we quash the writ of certiorari as having been improvidently granted.

WRIT QUASHED.

Hornsby, C.J., and Almon, Shores, Kennedy, and Cook, JJ., concur.

Maddox, Houston, Steagall, and Ingram, JJ., dissent.

INGRAM, JUSTICE (dissenting).

I believe that the trial court's denial of Darryl Travis Watkins's Rule 20, Ala.R.Cr.P., petition should be affirmed; therefore, I would reverse the judgment of the Court of Criminal Appeals remanding this case to the trial court. See Watkins v. State, [Ms. CR-90-989, September 30, 1992] ___ So.2d ___(Ala. Crim. App. 1992).

This case has a long history, and that history should be reviewed for a proper perspective on the September 30, 1992, opinion of the Court of Criminal Appeals:

1. In 1982 Watkins was convicted of murder and was sentenced to death for the 1980 killing of 79-year-old Milton Mayfield during a robbery.

2. The Court of Criminal Appeals affirmed the conviction and sentence. Watkins v. State, 509 So.2d 1056 (Ala. Crim. App. 1983). This

Court affirmed two of the holdings of the Court of Criminal Appeals, but remanded the cause on a third issue. Ex parte Watkins, 509 So.2d 1064 (Ala. 1984). Thereafter, the Court of Criminal Appeals again affirmed Watkins's conviction and sentence. Watkins v. State, 509 So.2d 1067 (Ala. Crim. App. 1985).

3. Following the affirmance on remand, Watkins presented a new claim before this Court regarding the striking of a veniremember who disapproved of the death penalty, and this Court remanded for examination of the issue. Ex parte Watkins, 509 So.2d 1071 (Ala. 1986). Thereafter, the Court of Criminal Appeals again affirmed on remand. Watkins v. State, 509 So.2d 1071 (Ala. Crim. App. 1986).

4. Following this remand, Watkins raised another new claim, that the State had violated the newly announced rule of Batson v. Kentucky, 476 U.S. 79 (1986), by striking veniremembers solely because of their race. This Court affirmed the conviction and sentence in Ex parte

Watkins, 509 So.2d 1074 (Ala. 1987), and the United States Supreme Court denied Watkins's petition for review. Watkins v. Alabama, 484 U.S. 918 (1987).

5. The Jefferson County Circuit Court denied Watkins postconviction relief, and on September 30, 1992, the Court of Criminal Appeals remanded the case to that circuit court with instructions. Watkins v State, [Ms. CR-90-989, September 30, 1992] ___ So.2d ___ (Ala. Crim. App. 1992).

I believe that the September 30, 1992, opinion of the Court of Criminal Appeals, holding that Watkins's counsel was deficient in raising the Batson issue before this Court in 1987 because he failed to supplement the record to show the racial composition of the venire and the peremptory strikes made by the State in Watkins's 1982 trial, is plainly incorrect.

As I understand the law existing at that time, he was not required to raise these specific matters in his 1987 appeal in support of the

Batson issue, nor was he required to foresee that the racial composition of the venire and the peremptory strikes would be a critical part of "raising the Batson issue" in the future.

In the 1987 proceeding, Watkins's counsel presented to this Court all that he knew had to be presented in support of the Batson argument. He did this by utilizing the pertinent language of Batson so as to effectively present the Batson issue for his client in a certiorari proceeding that was filed more than four years after his client's 1982 trial.[1] This Court responded

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[1]In his brief before this Court in 1987, Watkins's counsel contended the following:

"The criteria set out in Batson v. Kentucky, [476 U.S. 79 (1986)], provides that to establish a prima facie case of discrimination the appellate must show the following:

"'(1) The appellant is a member of "a cognizable racial group" and "the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."

"'(2) That "peremptory challenges constitute a

by finding that a Batson violation had not occurred. That was the law at that time. So, because Watkins's counsel did all that he could do as counsel at that time, I cannot find that counsel's representation of Watkins was ineffective when he was before this Court in 1987. That opinion should have settled the Batson issue in this case. It also follows that if counsel's representation was not ineffective,

---

(Footnote Continued)

jury selection practice that permits 'those to discriminate who are of a mind to discriminate....'"

"'(3) That the prosecutor excluded veniremen from the jury on the basis of their race.'

"The appellant argues that he has presented a prima facie case of discrimination, in that he is black and blacks were struck from the venire by the prosecutor's use of peremptory challenges.

"Appellant is aware that this issue has not been presented previously, but under the plain error exception to Rule 39(k), A.R.A.P., the appellant would request that this Court review the issue since it has 'adversely affected the substantial rights of the petitioner.'"

then the recurrent Batson issue is not properly before this Court at this time.

I believe that society's expectation of its courts, under the law and within the rules, is that we should establish some reasonable point at which post-judgment review would end. At least we should preclude the same issue, once raised, reviewed, and decided, from recurring on appeal. I believe this case would be an appropriate one in which to establish that point.

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), stated that the proper standard for judging attorney performance in regard to ineffective-assistance-of-counsel claims is "simply reasonableness under prevailing professional norms." 466 U.S. 688. Further, it addressed the temptation of looking backward with the knowledge of current law:

> "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to

> evaluate the conduct from counsel's perspective at the time. "

466 U.S. at 689. (Emphasis added.)

Because I feel that this Court should reverse the ruling of the Court of Criminal Appeals, I respectfully dissent from the majority's decision to quash the writ issued on the State's petition.

Maddox, Houston, and Steagall, JJ., concur.

APPENDIX E

ORDER OF THE CIRCUIT COURT
OF JEFFERSON COUNTY
DENYING RELIEF

STATE OF ALABAMA	) IN THE CIRCUIT COURT OF
	)
VS	) THE TENTH JUDICIAL CIRCUIT
	)
DARRYL TRAVIS WATKINS	) BIRMINGHAM DIVISION
	)
Defendant	) CASE NO. CC81-937

O R D E R

This is a collateral attack on a conviction of Capital Murder and sentence of death imposed in this case. The history of prior proceedings is set out as follows;

Petitioner was convicted of a capital offense and was sentenced to death on April 14, 1982. He appealed his conviction and sentence. The facts of Petitioner's appeal are as follows:

(a) The Alabama Court of Criminal Appeals affirmed Petitioner's conviction and sentence on July 5, 1983. Petitioner thereafter appealed to the Alabama Supreme Court.

(b) The Alabama Supreme Court remanded the case with instructions on February 3, 1984.

(c) The Alabama Court of Criminal Appeals reversed and remanded the case to the trial court on March 20, 1984.

(d) The Alabama Court of Criminal Appeals superseded its order of March 20, 1984 with a new order remanding the case to the trial court, dated September 24, 1984.

(e) Following a hearing before the trial court which reported its findings of fact to the Alabama Court of Criminal Appeals, the Court of Criminal Appeals again affirmed Petitioner's conviction and sentence on October 22, 1985.

(f) Following the Alabama Court of Criminal Appeals' affirmance of the Petitioner's conviction and sentence, Petitioner filed a petition for a Writ of Certiorari to the Court of Criminal Appeals in the Alabama Supreme Court, raising a new issue. The Supreme Court granted the petition for the limited purpose of remanding the case to the Court of Criminal Appeals for its consideration of the claim, on March 28, 1986.

(g) The Court of Criminal Appeals again affirmed on October 14, 1986 Watkins' subsequent

petition for Writ of Certiorari to the Alabama Supreme Court resulted in an affirmance of conviction and death sentence. The U.S. Supreme Court refused to grant a Writ of Certiorari on October 10, 1987.

A statement of the facts presented at trial are set forth in the first opinion of the Alabama Court of Criminal Appeals at 509 So.2d, 1056.

Initially the Petitioner filed a Petition for Writ of Habeas Corpus. The Court made rulings on preliminary motions as follows:

1. Motion for Funds for Retention of Expert Defense counsel was denied.

2. Motion for Funds for Appointment of a Neuropsychologist was denied.

3. Motion for Funds for Appointment of Investigator was denied.

4. Motion for Discovery was granted.

On April 17, 1990 a Superseding Petition Pursuant to Temporary Rule 20 Petition for Writ of Habeas Corpus was filed which supplanted all petitions and amendments previously filed. In this petition, Mr. Watkins, seeks a new trial

alleging a number of specific grounds. These allegations are set out in individual paragraphs designated as, A through MM.

A number of the claims made by Petitioner are found by the Court to be [procedurally] barred from review. The scope of post conviction review is clearly set out in Rule 20.1 (now designated as Rule 32). Rule 20.2 identifies those grounds that are precluded from review.

The allegations that are [procedurally] barred and the reasons for such preclusion are as follows:

CLAIM C

THE PROSECUTOR USED PEREMPTORY CHALLENGES TO EXCLUDE BLACKS FROM PETITIONER'S JURY, IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BOTH ALABAMA STATE STATUTE AND CONSTITUTION.

CLAIM D

PETITIONER WAS PLACED IN A LINEUP WITHOUT PROBABLE CAUSE TO BELIEVE THAT HE COMMITTED THE INSTANT OFFENSE, AND EVIDENCE OF THE LINEUP WAS ADMITTED AT TRIAL DENYING PETITIONER HIS RIGHT TO A FAIR TRIAL AND TO DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION AND STATUTORY LAW OF THE STATE OF ALABAMA.

CLAIM E

PETITIONER WAS DENIED A FAIR TRIAL BY AN IMPARTIAL JURY AND A FAIR, RELIABLE, INDIVIDUALIZED DECISION ON PUNISHMENT GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND STATUTORY LAW OF THE STATE OF ALABAMA, DUE TO EXTENSIVE AND PREJUDICIAL PRE-TRIAL PUBLICITY.

These claims are [procedurally] barred by Rules 20.2(a)(3) and (5) in that they could have been but were not raised at trial and on direct appeal.

CLAIM F

THE PROSECUTOR'S FAILURE TO TIMELY DISCLOSE EXCULPATORY MATERIAL VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER THE CONSTITUTION OF THE STATE OF ALABAMA AND UNDER STATE STATUTE.

This claim is [procedurally] barred by Rule 20.2(a)(4) in that it was raised and addressed on appeal.

CLAIM G

THE INTRODUCTION INTO EVIDENCE OF A HIGHLY INFLAMMATORY PHOTOGRAPH OF THE VICTIM VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER THE ALABAMA STATE STATUTE AND CONSTITUTION.

This claim is [procedurally] barred by Rule 20.2(a)(5) in that it was raised at trial. Petitioner admits that an objection was taken to this exhibit at trial.

CLAIM H

THE TESTIMONY OF THE DECEDENT'S WIDOW AND HER PRESENCE IN THE COURTROOM DURING PETITIONER'S TRIAL VIOLATED PETITIONER'S RIGHTS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF ALABAMA AND STATE STATUTE.

CLAIM I

THE COURT IMPROPERLY ADMITTED EVIDENCE LINKING PETITIONER TO A SEPARATE PENDING CHARGE IN VIOLATION OF HIS RIGHTS PURSUANT TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF ALABAMA AND STATE STATUTE.

CLAIM J

BY ELICITING INCOMPETENT AND IRRELEVANT TESTIMONY FROM AN EXPERT WITNESS, THE STATE OF ALABAMA DENIED PETITIONER THE RIGHT TO EQUAL PROTECTION, A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF ALABAMA AND UNDER STATE STATUTE.

CLAIM K

THE PROSECUTORS' SUMMATIONS DURING THE GUILT PHASE DENIED PETITIONER HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF ALABAMA AND STATE STATUTE.

CLAIM L

THE PROSECUTION'S CLOSING ARGUMENTS DURING THE PENALTY PHASE OF PETITIONER'S TRIAL VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF ALABAMA AND UNDER STATE STATUTE.

CLAIM M

THE COURT'S FINAL INSTRUCTIONS TO THE JURY DURING THE GUILT PHASE OF THE TRIAL FAILED TO GUIDE THE JURY IN THEIR DELIBERATIONS AND THUS VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TO THE CONSTITUTION OF THE STATE OF ALABAMA AND ALABAMA STATUTE.

CLAIM N

THE JURY WAS PERMITTED TO HEAR EVIDENCE AT THE PENALTY PHASE WHICH AMOUNTED TO AN ADDITIONAL, NON-STATUTORY AGGRAVATING FACTOR, IN VIOLATION OF PETITIONER'S RIGHTS AS PROTECTED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION [...] AND THE CONSTITUTION OF THE STATE OF ALABAMA AND ALABAMA STATUTE.

CLAIM O

THE ALABAMA DEATH PENALTY STATUTE VIOLATES THE FOURTH, FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT IT FAILS TO PROVIDE FOR AN INDIVIDUALIZED DETERMINATION OF THE WEIGHT TO BE ACCORDED TO A PRIOR CONVICTION SOUGHT TO BE USED AS AN AGGRAVATING FACTOR.

CLAIM P

THE APPLICATION OF THE ALABAMA DEATH PENALTY STATUTE DENIED PETITIONER HIS RIGHTS PURSUANT TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT IT ALLOWED PETITIONER'S CONVICTION FOR A ROBBERY COMMITTED WHEN HE WAS SIXTEEN YEARS OLD TO HAVE BEEN USED AS AN AGGRAVATING FACTOR IN HIS SENTENCE.

CLAIM Q

THE ALABAMA DEATH PENALTY STATUTE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE IT DOES NOT PROVIDE FOR COMPARATIVE REVIEW OF SENTENCES, THEREBY FAILING TO ASSURE RATIONAL AND EVEN-HANDED IMPOSITION OF CAPITAL PUNISHMENT IN ALABAMA.

These claims are [procedurally] barred by Rules 20.2(a)(3) and (5) in that they could have been but were not raised at trial and on direct appeal.

CLAIM R

THE IMPOSITION OF THE DEATH PENALTY, PURSUANT TO THE CONSTRUCTION GIVEN THE ALABAMA DEATH PENALTY STATUTE BY THE SUPREME COURT OF ALABAMA IN BECK V. STATE DEPRIVES THE PETITIONER OF HIS RIGHTS PURSUANT TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AS WELL AS ALABAMA CONSTITUTIONAL AND STATUTORY LAW BECAUSE SUCH PUNISHMENT WOULD BE IMPOSED PURSUANT TO A JUDICIALLY CREATED SCHEME RATHER THAN ONE ADOPTED BY THE LEGISLATURE.

This claim is [procedurally] barred by Rule 20.2(a)(4) in that it was raised and addressed on appeal.

CLAIM S

THE PETITIONER WAS SENTENCED TO DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND IN THAT THE DEATH SENTENCE WAS BASED ON AN AGGRAVATING FACTOR WHICH MERELY REPEATS AN ESSENTIAL ELEMENT OF THE UNDERLYING CRIME.

CLAIM T

THE IMPOSITION OF THE DEATH SENTENCE WAS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ALABAMA LAW BECAUSE PETITIONER WAS FOUND TO HAVE KILLED A VICTIM OF A ROBBERY AND THE WOR[D] "VICTIM" IN THE STATUTE WAS APPLIED TO A PERSON WHO WAS MERELY PRESENT AT THE ROBBERY.

CLAIM U

THE DEATH PENALTY VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

CLAIM V

ELECTROCUTION AS A MEANS OF PUNISHMENT VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

CLAIM W

THE STATE OF ALABAMA, BY APPOINTING THE SAME ATTORNEY FOR TRIAL AND APPEAL, EFFECTIVELY DENIED PETITIONER'S RIGHT TO COUNSEL UNDER THE FIFTH, EIGHTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM X

THE STATE OF ALABAMA'S USE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACKS, WAS A PURPOSEFUL AND DELIBERATE DENIAL TO BLACKS ON ACCOUNT OF RACE OF JURORS IN THE A[D]MINISTRATION OF JUSTICE AND VIOLATED THE EQUAL PROTECTION CLAUSE AND DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS.

CLAIM Y

THE ALLOTMENT OF ONLY ONE THOUSAND DOLLARS TO PETITIONER'S TRIAL COUNSEL FOR COMPENSATION AND EXPENSES WAS WOEFULLY INADEQUATE AND THUS PETITIONER WAS DENIED THE RIGHT TO COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH[,] AMENDMENTS AS WELL AS DUE PROCESS AND EQUAL PROTECTION AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT AND THOSE RIGHTS BY ALABAMA LAW.

CLAIM Z

THE DEFECTIVE INDICTMENT ANCHORING PETITIONER'S PROSECUTION AND THE GRAND JURY GIVING RISE TO IT, INFECTED ALL PROCEEDINGS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF ALABAMA AS WELL AS ALABAMA STATUTE.

CLAIM A-A

THE WITHHOLDING OF GRAND JURY NOTES UPON WHICH THE PRESENTENCE REPORT RELIED VIOLATED PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND THE CONSTITUTION OF THE STATE OF ALABAMA AND ALABAMA STATUTE.

CLAIM B-B

IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND UNDER THE ALABAMA CONSTITUTION AND STATUTE, THE JURY WAS MISINSTRUCTED, AND THE COURT MISDIRECTED, IN PENALTY PHASE.

CLAIM C-C

THE SENTENCING COURT REFUSED TO CONSIDER MITIGATING FACTORS AND FAILED TO MAKE, OR REQUIRE, A SUFFICIENCY FINDING THERFBY RENDERING PETITIONER'S DEATH SENTENCE INFIRM UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND UNDER ARTICLE ONE, SECTION SIX OF THE CONSTITUTION OF THE STATE OF ALABAMA AND THE ALABAMA STATUTE.

CLAIM D-D

PETITIONER'S CONVICTION AND SENTENCE ARE PURSUANT TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS CONSTITUTIONALLY AND STATE-STATUTORILY INFIRMED DUE TO THE COURT'S FAILURE TO INQUIRE INTO THE RACIAL ATTITUDES OF PROSPECTIVE JURORS.

These claims are [procedurally] barred in that they could have been but were not raised at trial and on direct appeal.

CLAIM E-E

PETITIONER'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE CONSTITUTION AND STATUTES OF THE STATE OF ALABAMA IN LIGHT OF THE LIFE SENTENCE RECEIVED BY PETITIONER'S ALLEGED ACCOMPLICE.

This claim was raised at trial but was not raised on direct appeal. It is [therefore], precluded from review.

CLAIM F-F

THE "VICTIM IMPACT STATEMENTS" INCORPORATED INTO THE PRE-SENTENCE INVESTIGATION VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER THE CONSTITUTION OF ALABAMA AND STATE STATUTE.

CLAIM G-G

THE BYZENTINE NATURE OF POST-CONVICTION PROCEEDINGS WOULD RENDER ANY IMPOSITION OF THE DEATH PENALTY CRUEL AND UNUSUAL.

This is an unusual argument. Petitioner complains about the very [procedure] he is currently using as his last [resort] in State Court to collaterally attack his conviction. This contention is without merit and does not entitle Petitioner to the relief sought.

CLAIM H-H

THE EXECUTION OF A PERSON POSSIBLY IN THE STATE OF MORAL SIN AND SPIRITUAL UNREADINESS POTENTIALLY SENDS THAT PERSON TO HIS ETERNAL DAMNATION AND THUS CONSTITUTES THE MOST EGREGIOUS VIOLATIONS OF THE EIGHTH AMENDMENT'S PROSCRIPTION OF CRUEL AND UNUSUAL PUNISHMENT AND THE FIRST AMENDMENT'S GUARANTEE OF RELIGIOUS LIBERTY.

CLAIM I-I

PETITIONER WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT AND OTHER RIGHTS UNDER THE FOURTH, FIFTH, SIXTH AND EIGHTH AMENDMENTS AS WELL AS STATE CONSTITUTIONAL AND STATUTORY RIGHTS BY THE USE OF HIS PRIOR ROBBERY CONVICTION AS AN AGGRAVATING FACTOR.

CLAIM J-J

THE 1976 ROBBERY CONVICTION INTRODUCED AS AN AGGRAVATING FACTOR AT PETITIONER'S CAPITAL TRIAL SHOULD BE RENDERED NULL AND VOID PURSUANT TO THE PROVISIONS OF TEMPORARY RULE 20 DUE TO ITS FEDERAL AND STATE CONSTITUTIONAL AND STATUTORY DEFECTS.

CLAIM K-K

THE SENTENCE OF DEATH WAS IMPOSED ON PETITIONER IN FURTHERANCE OF A RACIALLY DISCRIMINATORY PATTERN VIOLATIVE OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AS WELL AS ALABAMA CONSTITUTION AND STATUTES.

CLAIM L-L

THE LACK OF A COMPLETE APPELLATE RECORD IN PETITIONER'S RIGHTS PURSUANT TO ALABAMA CONSTITUTIONAL AND STATUTORY LAW AS WELL AS THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Because these claims could have been but were not raised at trial nor on direct appeal, they are precluded from review by Rule 20.2 (a) (3) and (5).

In addition to these allegations, Petitioner contends that he was denied effective assistance of counsel at trial in both the quilt and punishment stages and at the appellate stage. A

hearing was held on these allegations. The following findings of fact are made:

Louis Wilkinson represented the Petitioner at trial. Counsel was admitted to practice in 1963. He has been involved in Criminal law both as a prosecutor and defense counsel. His practice is [predominantly] criminal and he had tried three to five hundred felony cases and 6 capital cases. Few lawyers in Jefferson County, Alabama have as much experience and expertise in the field of Criminal law as does Louis Wilkinson. Mr. Wilkinson was assisted by two other lawyers in his firm.

[Petitioner] contends that counsel was ineffective in the guilt phase of his trial in 9 specific instances identified in the Superseding Petition Sec. A 1, in Paragraphs a. through i., found on pages 12 through 19 of the petition.

a. Investigation and preparation.

Trial counsel was not deficient in this respect. He interviewed the defendant, reviewed the prosecutions' file and considered the Petitioner's alibi. The decision not to present

an alibi is reasonable because of its lack of credibility and because of the great opportunity it would present for the prosecution to go into details of other events prejudicial to the Petitioner, occurring at [or] near the location of Petitioner's alibi. The Court finds that trial counsel was not ineffective for failing to call Junior Warmley as a defense witness. While the record of this hearinq reflects Mr. Warmley's present testimony, it is more different to ascertain what he would have said at trial. It is clear that he told Sgt. Albert Wallace in 1981 that he could not identify the men he saw and he picked Petitioner out of a line up as looking like one of the two men he saw running. Counsel can not be faulted for failing to call a witness who would testify that he saw some one who looked like his client running near the scene of the crime.

Because of the positive identification made by witnesses at the scene there is no reasonable probability that Mr. Warmley's testimony would have changed the outcome of the trial.

b. Relationship with Petitioner.

Petitioner's allegations here are not supported by the evidence. Counsel did discuss the alibi defense mentioned and there is no evidence to support what counsel for Petitioner calls "other possible defense."

c. Pre-trial Proceedings.

Petitioner was not prejudiced here, counsel did unsuccessfully object at trial to these matters. There is nothing in the record to suggest that the result would have been different if these issues were raised prior to trial.

d. Petitioner alleges that trial counsel was ineffective in the jury selection process. The Court finds that the jury in this case had only one black member and the State used peremptory challenges to exclude a number of blacks from the jury. The evidence presented indicates that the defendant could have made out at least a prima facie case that the State used peremptory challenges to improperly exclude blacks from Petitioner's jury by what is now generally

referred to as a Batson motion. However, it must be noted that this trial preceded Batson by four years. Trial counsel was not ineffective by failing to make a record upon which this claim could later be raised and was not ineffective for failing to object to this under the state of the law at the time of trial. This issue was raised on direct appeal after the decision in Batson v. Ky. 476US 79(1986).

The matters asserted in Paragraphs e, f, g, h and i are merely ways of saying that present counsel would have tried this case differently than did trial counsel. None of these allegations support Petitioner's claim that trial counsel was ineffective in the [guilt] phase of his trial.

In Section A, 2, Petitioner contends that trial counsel was ineffective at the sentencing phase. These allegations are not supported by the evidence presented at the hearing on this petition.

While the bounds of what may be offered in mitigation are broad, what should be offered as a

mitigating factor is very subjective. An equally strong argument for example can be made that the fact Mr. Watkins was brought up in a good home, with siblings who did not turn to a life of crime and having a father who worked two jobs is not mitigating but could have the opposite effect on a jury. As the State argues there is no reasonable probability that if mitigating evidence such as this was offered the result would have been any different. Trial counsel attempted to mitigate the sentence in this case by what is referred to as residual doubt. This was a reasonable approach under the facts of this case and in light of the other mitigation options available.

In Claim B, [Petitioner] alleges that he was denied effective assistance of counsel at the appellate level. Counsel for Petitioner raised a number of issues on appeal that he felt had merit. Failing to raise on appeal every adverse ruling or every ruling present counsel suggests is no evidence of ineffective assistance of counsel.

Appellate counsel did attempt to raise a "Batson" issue on appeal. Petitioner also contends that appellate counsel was ineffective in not seeking to supplement the appellate record pursuant to Rule 10(f) of the Alabama Rules of Appellate Procedure, to show the prosecutions peremptory strike of black prospective jurors.

It is the Court's opinion that this rule is not applicable because the matter sought to be added was not omitted by error, accident or misstatement. It is also clear that the Appellate Court on its own initiative could order this correction if it considered it necessary or appropriate.

Appellate counsel was not ineffective.

In Claim M-M Petitioner alleges that he is entitled to a new trial as a result of what he characterizes as newly discovered evidence. A hearing was held on this issue.

At this hearing Bobby Jean Carter testified that Benny Ray Jones confessed to him in 1984 that the Eugster's [Market] case was "his" and that he knew the Petitioner was innocent.

Benny Ray Jones testified that he did not make the statements attributed to him by Carter. While both Carter and Jones are equally unreliable, the credibility of Jones' testimony is at least supported by common sense. There is no reason to believe that Jones would admit to a capital offense.

Regardless of the issue of credibility, Carter's testimony of what he said Jones said, would not be admissible and cannot be properly characterized as evidence.

The issue of Junior Warmley's testimony has been previously discussed.

The Petitioner is not entitled to relief on the ground of newly discovered evidence.

Having considered the assertions of the Petitioner in light of the totality of the evidence presented in this post-conviction hearing and the evidence addressed at trial it is the judgment of this Court that counsel for Petitioner was not ineffective. Counsel met and surpassed the standard of professional reasonableness. Petitioner has failed to show

that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The relief sought by Petitioner is denied.

Done and Ordered this the /19th/ day of February, 1991.

/s/_____
SENIOR CIRCUIT JUDGE

ORIGINAL

Supreme Court, U.S.
FILED
MAY 6 1994
OFFICE OF THE CLERK

(3)

NO. 93-1596

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF ALABAMA,
Petitioner,
v.
DARRYL TRAVIS WATKINS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 93-1596

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF ALABAMA,	)
Petitioner,	)
v.	)
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Respondent.	)

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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No. 93-1596

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF ALABAMA,	)
Petitioner,	)
v.	)
DARRYL TRAVIS WATKINS,	)
Respondent.	)

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

COMES NOW DARRYL TRAVIS WATKINS, who respectfully files the following opposition to the State of Alabama's *Petition for a Writ of Certiorari to the Supreme Court of Alabama* (hereinafter *"Petition"*).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Alabama Court of Criminal Appeals has granted Darryl Watkins post-conviction relief from his capital conviction and death sentence. That relief arises from the ineffectiveness of

Mr. Watkins' 1987 appellate counsel.

Mr. Watkins, a young black man, was convicted and sentenced to death for the robbery-murder of an elderly white man in Birmingham. This Court, however, decided Batson v. Kentucky, 476 U.S. 79 (1986), while Mr. Watkins was on direct appeal. And that decision gave Mr. Watkins potentially invincible grounds for reversal. For, at trial, the prosecution had peremptorily struck at least twelve of thirteen African-American venirepersons.

Nonetheless, Watkins' Batson claim failed. It failed because appellate counsel neglected to supplement the record which, as originally composed and transmitted, did not reflect the prosecution's apparently discriminatory strikes.

This unreasonable neglect, the Alabama Court of Criminal Appeals has held, entitles Mr. Watkins to a new trial, unless the State of Alabama, on remand to the trial court, can provide race-neutral reasons for its strikes.

The State of Alabama has now petitioned this Court for a writ of certiorari. It proffers this single *question presented*: "[W]hether counsel rendered ineffective assistance when he failed to move to supplement the record in 1987 with information about the racial composition of the 1982 venire and the race of the jurors struck, **even though that information only became necessary after 1987, as a result of the subsequent developments in Batson law.**" *Petition* at 10 (emphasis added). Because neither the record

nor the decision below present this question, the State's petition should be denied.

More fully, the Petitioner contends that Strickland v. Washington, 466 U.S. 668 (1984), was misapplied: By deeming appellate counsel deficient for not supplementing the record to reflect the district attorney's peremptory strikes, the Court of Criminal Appeals effectively required appellate counsel "to predict the future development of the law in order to provide effective assistance". *Petition* at 11. The "Court of Criminal Appeals found counsel ineffective because he failed to forecast changes in the law"; the state appeals court "condemn[ed] counsel for his inability to predict the substantial development in Batson law". *Petition* at 17; 19-20.

In reality, Strickland properly controlled below, and the Court of Criminal Appeals did not impose any prognosticatory duties on appellate counsel. Reasonably effective appellate counsel was only expected to know one thing: A Batson claim could not succeed without some basic evidence in the record pertaining to the state's striking of black venirepersons. As shown below, reasonable notice of this fact was abundant in 1987.

Such notice abounded from state appellate rules, appellate advocacy treatises, Batson itself, and Batson's state law progeny. It even sprang forth from the pages of the 1987 supplemental

briefing which the current Petitioner submitted to the Alabama Supreme Court.

WHY THE PETITION SHOULD BE DENIED

I. NEITHER THE DECISION NOR THE RECORD BELOW RAISES THE QUESTIONS PRESENTED IN THE PETITION.

The Court of Criminal Appeals held appellate counsel was ineffective when he raised a claim under Batson v. Kentucky, 476 U.S. 79 (1986), but failed to supplement the record to reflect the prosecutor's discriminatory use of peremptory challenges. Watkins v. State, slip op. at 7-12;19; *Petitioner's Appendix A,* pp. 9-15; 29-30.

Petitioner contends the Court of Criminal Appeals thereby twisted Strickland and ascribed to appellate counsel a duty to discern the shape of case law to come. The Court of Criminal Appeals, argues the Petitioner, imposed on Watkins' appellate lawyer an obligation "to present claims based on how the law may develop", since the "information [on racially-skewed challenges exercised by the state] only became necessary after 1987, as a result of the subsequent development in Batson law". *Petition* at 10;ii. This is nonsense, frivolous nonsense.

A. Appellate Counsel's Performance Below: Making A Claim Without Facts; Baking A Cake Without Ingredients

Batson v. Kentucky, 476 U.S. 79 (1986), was decided in April 1986, while Darryl Watkins' remained on direct appeal. Still, appellate counsel's November 1986 brief-in-main to the Alabama Supreme Court made no reference to Batson or to racially-skewed use of peremptory challenges. (Supp.H.000504)[1] Not until the February 1987 filing of his reply brief did appellate counsel argue Batson as a grounds for reversal. (Supp.H.000529)

Most importantly, even then, the Batson argument was pure law with no fact, an assertion of constitutional wrong completely unsupported by citation to the record:

> Since the submission of the original brief in this cause, recent cases from this Court and the United States Supreme Court make it necessary to raise another issue at this time, under the plain error rule. The cases referred to are Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712 (1986) and Ex parte Jackson, (84-1112, December 19, 1986).
>
> The appellant now contends that his equal protection rights were violated when the prosecution used its peremptory challenges to strike black jurors from the venire. The appellant is black and the victim was white.
>
> The criteria set out in Batson v. Kentucky, supra, provides that to establish a prima facie case of discrimination the appellant must show the following:

---

[1] "Supp.H. ____" refers to pages of the supplemental record compiled in, and generated by, the state post-conviction proceedings.

(1)The appellant is a member of "a cognizable racial group" and "the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."

(2)That "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (This element is a given).

(3)That the prosecutor excluded veniremen from the jury on the basis of their race.

> The appellant argues that he has presented a prima facie case of discrimination, in that he is black and blacks were struck from the venire by the prosecutor's use of peremptory challenges.
>
> Appellant is aware that this issue has not been presented previously, but under the plain error exception to rule 39(k), A.R.A.P., the appellant would request that this Court review the issue since it has "adversely affected the substantial rights of the petitioner.

(Supp.H.000529)

Neither the race of the venirepersons nor the identities of those struck by the district attorney were cited, because neither had been added to the record. Notwithstanding personal knowledge of the discrimination which had tainted jury selection, appellate counsel -- who had personally tried the case in circuit court -- failed to provide the Alabama Supreme Court with the factual record which would have ensured Batson relief.

(H.000112)[2]

Appellate counsel, to be more concrete, made no use of the procedural mechanism specifically designed for "correction or modification of the record...to conform to the truth". He did not employ Alabama Rule of Appellate Procedure 10(f) to effect the supplementation of the record necessary to protect his client.

Did this performance reflect the competent advocacy demanded, under Strickland, by the Sixth Amendment? Overlooking even appellate counsel's inexplicable failure to raise Batson in his November 1986 main brief, the Petitioner heaps praise on appellate counsel:

> Counsel not only raised a new issue based on a case decided four years after trial, he did so **in language that virtually paralleled the language used by this Court in the Batson decision.** Counsel's actions at that time were reasonable and, in fact, he succeeded in obtaining plain error review by the Alabama Supreme Court. Ex parte Watkins, 509 So.2d 1074, 1076 (Ala. 1987). This does not support a finding of ineffective assistance of counsel.

Petition at 13 (footnote omitted; emphasis added).

Of course, just as the mere recounting of a recipe does not make a cake, the simple recitation of how to prove a claim does not, in fact, prove it. A cake requires ingredients. And a

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[2] "H. ___" refers to pages of the main record compiled in, and generated by, the state post-conviction proceedings.

claim requires facts, evidence off which the argument is leveraged.

Unfortunately, appellate counsel, in his 1987 reply brief, never went beyond baldly asserting "blacks were struck from the venire by the prosecutor's use of peremptory challenges". (Supp.H.000529) Plainly, such hazy invocation of alleged facts outside the record enjoyed no legal weight under the law of Alabama. Webb v. State, 565 So.2d 1259 (Ala.Cr.App. 1990). Under these circumstances, Batson defeat was ensured.

The Petitioner, of course, presently contends we know this today only through case law developments subsequent to appellate counsel's 1987 labors:

> In holding that trial counsel's performance was deficient because he failed to put forth the "necessary Batson information" when no court had yet determined what information was necessary, Court of Criminal Appeals found counsel ineffective because he failed to forecast changes in the law. This decision is irreconcilable with established precedent.

Petition at 17.

To be sure, somewhere, some court has probably allowed hindsight to creep into its Strickland analysis. That, however, is not what happened in the Alabama Court of Criminal Appeals.

As amply demonstrated below, appellate counsel, brief-writing back in 1987, was on both general and specific notice as to the fatal flaw in his Batson argument. Reasonably, he should

have known both that a winning legal claim, invariably, must be anchored in fact and that Batson, in specific, demanded certain particular factual showings. Appellate counsel's failure to heed such notice placed him beyond the Sixth Amendment pale.

B. Alabama's Rules Of Appellate Procedure As A Contemporaneous Source Of General Notice In 1987

Rule 28 of the Alabama Rules of Appellate Procedure still makes clear -- just as it did in 1987 -- the role of the factual record in an appellate brief. Initially, it identifies the need for an appellant to provide "a full statement of the facts relevant to the issues presented for review, with appropriate references to the record". *ARAP 28(a)(4)* (parenthetical omitted).

More critically, it goes on to specify the necessity for argument and prescribes the basic formula such argument must follow:

> The brief of the appellant shall contain under appropriate headings and in the order here indicated: [*inter alia*] An argument (The argument may be preceded by a summary. The argument **shall contain** the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes **and parts of the record relied on**)...

ARAP 28(a), 28(a)(5) (emphasis added).

Finally, Rule 28 dictates, *inter alia*, "References in the briefs to the record on appeal **shall be** to the appropriate page numbers of the record on appeal..." *ARAP 28(e)*.

In short, the Alabama Rules of Appellate Procedure leave no room today -- and left no room in 1987 -- to doubt what is demanded of appellate counsel to prevail. Now, as in 1987, they plainly apprise appellate counsel of the need to factually ground his Batson argument, or any other claim for relief.

C. Professional Literature on Appellate Advocacy As A Contemporaneous Source Of General Notice In 1987

In 1951, United States Supreme Court Justice Robert Jackson, writing in the American Bar Association Journal, made a compellingly common sensical observation: "The purpose of a[n appellate] hearing is that the Court may learn what it does not know, and it knows least about the facts". 37 ABA J 801, 803 (1951).

Even without the guidance of our state appellate rules, appellate counsel should have been on notice as to the centrality of factual evidence in an appellate brief. Any number of appellate advocacy treatises available to appellate counsel in 1987 echoed Justice Jackson and stressed the overwhelming importance of the factual record.

In his book Appellate Practice in the United States

(1981), for instance, Robert Stern warned that:

> To regard the Statement [of Facts] as the factual part of the brief and the Argument as the legal section is, however, only a half-truth and a dangerous one. For factual issues are **argued** in the Argument, not the Statement. In many cases the only issues or the most important issues are factual.

Stern, p. 281.

Stern further reminded his readers that, most certainly, "[r]eferences to the facts are always to be supported by appropriate record references", that "[w]hen a fact in the record is referred to in the Argument, the record reference is to be cited...". Stern, pp. 272;281.

An ABA volume, also published in 1981, provided the same lessons: "A good theory of the case has a good factual foundation in the factual record." And "[a]ll the facts included [in argument] must be supported by the record and should not be overstated." Carre, Ntephe and Trainor, eds., ABA Appellate Advocacy (1981), pp. 101;110.

Available to appellate counsel in 1987, too, was an appellate advocacy text used in law schools across the country: Wiener's Effective Appellate Advocacy. Wiener made unmistakably plain the need to construct appellate argument carefully and accurately around facts discernable from the record. For argument, "[b]asically, three steps are necessary: First you

D. Batson Itself, Commentary, And Case Law As Contemporaneous Sources Of Specific Notice

Assuming for the moment that appellate counsel was unaware of the general requirement that legal arguments have factual roots, the specific case law he relied on should have so informed him.

1. Batson v. Kentucky

This Court ruled in Batson v. Kentucky, 476 U.S. 79 (1986), that a prosecutor's racist use of preemptory challenges was susceptible to being proven and remedied even in the context of a single trial. The Court, however, made perfectly clear that a remedy could not be won with mere allegation or legal incantation. Rather, a defendant must make a factual showing based on actual evidence in the record:

> (D)efendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely **on evidence** concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the **defendant first must show** that he is a member of a cognizable racial group ... and [**also show**] that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, **the defendant must show** that these facts and any other relevant circumstances raise an

> inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raise the necessary inference of purposeful discrimination.

Id. at 96(emphasis added).

Reasonably effective counsel citing Batson v. Kentucky would have fully and thoroughly read Batson v. Kentucky. He then would have known Batson to demand factual showings.

2. The Alabama Lawyer

Batson was not kept a secret in our local legal community. *The Alabama Lawyer*, in its July 1986 issue, featured Batson as the first entry in its "Recent Decision's of the Supreme Court of the United States" section. The synoptic treatment of Batson ran almost two full columns. More to the point, it repeatedly specified that which a defendant "must show", as well the procedure following a "*prima facie* showing". *The Alabama Lawyer*, July 1986, at 216-17.

3. Ex parte Jackson

Appellate counsel, in addition to citing Batson in his reply brief, also cited to Ex parte Jackson, 516 So.2d 768 (Ala. 1986). (Supp.H.000532)

This made even more unreasonable appellate counsel's

having ignored the factual predicate required for Batson relief. Ex parte Jackson excerpted from Batson the precise language which outlines a defendant's factual burden. 516 So.2d at 772-73. It also detailed, especially in Justice J. Gorman Houston's concurring opinion, the exact facts allowing for Batson's favorable application. Id.

E. The Attorney General's Office As A Contemporaneous Source of Specific Notice

Last, if appellate counsel did not know he needed Batson facts to make a Batson claim when he first raised Batson in his 1987 reply brief, he sure knew it when he received the Attorney General's special supplemental brief.

The Attorney General, after receiving appellate counsel's 1987 reply brief, moved for -- and received -- permission to respond. (Supp.H.000112) In that response, the Attorney General focused exclusively on the absolute dearth of evidence concerning the state's striking of black persons:

> This case is markedly different from Batson and Jackson in that there is nothing in this record to suggest that a prima facie case could be established ... The case, therefore, fails utterly to meet part of the first requirement of Batson, that the prosecutors have struck members of the defendant's race from the jury.

1987 Brief and Argument in Reply to Petitioner's Response at 3(footnote omitted).

Perhaps more to the point: "The defendant cannot argue that error is plain or obvious where there is no indication in the record that the act on which the error is predicated -- the striking of blacks by the State -- ever occurred". *1987 Brief and Argument in Reply to Petitioner's Response* at 4.

Appellate counsel, even after reading this, did nothing to cure the deficient record before the Alabama Supreme Court rendered its decision. (R.000112)

F. In Sum

Appellate counsel, as shown, had every reason to know merely crying Batson on a still barren record would fail. He had no reason to ignore the need to move for supplementation under Alabama Rule of Appellate Procedure 10(f). There was nothing to lose by making such a motion and no way to win without making it.

More, Petitioner does not even contest that such a motion would assuredly have enjoyed more than a reasonable probability of success.

Counsel did not fail for want of notice or precognitive ability. He failed for want of care.[3] He did not "support his

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[3]It might be noted that Mr. Watkins' direct capital appeal does not represent the only time his 1987 appellate counsel, J. Louis Wilkinson, fell outside the bounds of adequate representation. *See* Mylar a/k/a Miles v. Wilkinson, 435 So.2d 1237 (where Mr. Wilkinson is named as the appellate lawyer found ineffective in Mylar v. State of Alabama, 671 F.2d 1299 (11th Cir. 1982)). *Cf.* Clarke v. State , 583 So.2d 631, 632-33 (Ala. 1991)(where Mr. WIlkinson failed to comply with Alabama Rule of

client's appeal to the best of his ability". Anders v. California, 386 US 738, 744 (1967).

CONCLUSION

Wherefore, Mr. Watkins respectfully submits that it would be improvident to grant certiorari in this case.

Respectfully submitted,

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Appellate Procedure 39(k) and thus forewent consideration of challenge to search warrant).